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FILE COPY

Nos. 408, 409

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust under the Last Will and Testament of Angier B. Duke, deceased, for the benefit of Anthony Newton Duke,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust under the Last Will and Testament of Angier B. Duke, deceased, for the benefit of Angier B. Duke, Jr.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF.

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MOTION

Now comes the undersigned and moves for leave to file the annexed brief as *amicus curiae* on behalf of the Committee of Banking Institutions on Taxation, which Committee consists of many national and state banks and trust companies that act as trustees of numerous testamentary

and *inter vivos* trusts, the consent of counsel for the petitioner and that of counsel for the respondent in each case having been first obtained.

Respectfully submitted,

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Of Counsel:

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Brief of *Amicus Curiae*

Argument

The Committee of Banking Institutions is composed of many banks and trust companies which have for many years administered as trustees a large number of testamentary and *inter vivos* trusts. In that capacity these institutions have filed thousands of federal income tax returns from the time of the enactment of the first income tax laws to the present time and have consistently deducted the necessary commissions paid to trustees. The deductions have consistently been allowed by the Treasury Department without question. No question concerning the deductibility of these commissions was ever raised by the Treasury Department in such a way as to constitute any challenge of the general rule until 1937 and even then the objection to the deductions was made simply to bolster a disallowance originally made because of some special circumstance involved.

The uniform practice of the Bureau of Internal Revenue in allowing trustees' commissions is shown in a number of rulings covering the period from 1921 to 1938. S. O. 88, 4 C. B. 119; I. T. 1393, I-2 C. B. 83; S. M. 2463, III-2 C. B. 91; I. T. 3163, 1938-1 C. B. 202. If these rulings stood alone they might not have sufficient dignity to be determinative. *Cf. Higgins* vs. *Commissioner*, No. 253, this Term. The significance of the rulings is greatly enhanced, however, when they are shown to represent the Treasury's views for many years without change or direct challenge until the cases at bar.

During the very period in which the Commissioner had successfully resisted the allowance of deductions for the expenses of investment management in the case of individuals, the ruling in I. T. 3163, *supra*, was published. The ruling was issued in February, 1938, and provided, in part:

> "As a general rule commissions or service charges of trustees constitute allowable deductions in computing the net income of an irrevocable trust."

In October of 1936 the Board of Tax Appeals had sustained the disallowance of deductions for custodian fees, secretary's salary and office rent in the case of an individual, the Board ruling that the taxpayer, as passive investor, was not engaged in a trade or business. *Heilbroner* vs. *Commissioner*, 34 B. T. A. 1200. Upon a similar ground the Commissioner was sustained in *Kales* vs. *Commissioner*, 34 B. T. A. 1046, with respect to the deductibility of certain fees paid in connection with suits to recover Federal income taxes in the case of an individual taxpayer. The decisions of the Board in the two cases were affirmed in December, 1938, and January, 1939, respectively. *Kane* vs. *Commissioner*, 100 F. (2d) 382 (C. C. A. 2nd); *Kales* vs. *Commissioner*, 101 F. (2d) 35 (C. C. A. 6th). Thus, while attacking the propriety of deductions for expenses incurred in the management of private estates, the Bureau officially recognized trustees' fees as proper allowances by a newly published ruling. In this setting we submit that I. T. 3163, *supra*, represents an evidence of administrative practice of much greater weight than might otherwise be associated with an office ruling. Furthermore, we think it constitutes a recognition by the Bureau that trustees' commissions are expenses of such a character as not necessarily to be governed by considerations applicable in the case of expenses incurred by private investors.

The Commissioner has from time to time contested the allowance of trustees' commissions because of special circumstances involved. Thus, in *Knox* vs. *Commissioner*, 3 B. T. A. 143 (Acq. V-1 Cum. Bull. 3) the Commissioner asked disallowance of a part of trustees' commissions on the ground that such part of the commissions were allocable to tax exempt income, and in *Bendheim* vs. *Commissioner*, 8 B. T. A. 158 (Acq. VII-1 Cum. Bull. 3) the Commissioner proposed to disallow such part of trustees' fees as were not, in his opinion, deductible in the particular taxable year because they were paid on account of income received and disbursed by the trustee in a previous year. There has been only one case, however, until the cases at bar, in which the general rule of allowance referred to in I. T. 3163 has been challenged by the Commissioner. In *Watson* vs. *Commis-*

sioner, 35 B. T. A. 706, the Commissioner contended that trustees' commissions were not deductible because the trust was not conducting a business. The Commissioner did not take this view in the particular case to secure disallowance of all the trustees' commissions paid but only in support of his action disallowing the proportion of the commissions allocable to tax exempt interest. Upon losing the case the Commissioner acquiesced. 1937-1 C. B. 5 *sub. nom. Corrigan Estate.* It is significant, we submit, that there have been no cases directly raising the issue whether ordinary trustees' commissions are deductible expenses in spite of thousands of instances over a period of many years in which such deductions have been claimed. There has been no occasion for litigation with respect to that question because trutees' commissions have regularly been allowed without any dispute except where some special circumstance was present. There has been, therefore, a settled administrative practice in this respect evidenced by Bureau rulings (the last of which was published at a significant moment as pointed out above), by absence of any direct challenge on the part of the Commissioner, and by the regular allowances granted in innumerable instances over a period of years.

In only two cases prior to the cases at bar has the Commissioner supported a disallowance of trustees' expenses other than trustees' commissions by the contention that the trust was not engaged in business. Thus, in *George Vanderbilt Trust* vs. *Commissioner,* 36 B. T. A. 967, involving attorneys' fees paid in connection with lawsuits to secure additions to the trust corpus, the Commissioner's principal contention appears to have been that the expenses were isolated, unusual and capital in nature but the additional suggestion was made that the trust was not engaged in a business to which the fees were to be properly regarded as an incident. It appears that the Commissioner probably allowed trustees' commissions without any question. See 36 B. T. A. 971. In *Dorr* vs. *U. S.*, 18 F. Supp. 92 (D. Mass.), trust expenses incurred to secure investment advice were disallowed but no question of trustees' commissions was involved and the disallowance of the expenses appears to

have originated because there was an undetermined portion of the expenses which were clearly not deductible because they had been incurred in connection with the drafting of the trust instrument. In *White Trust* vs. *Commissioner* (C. C. A. 3rd) decided October 9, 1940, not officially reported but printed in 40 C. C. H., Vol. 4, Par. 9712, after the decisions in the cases at bar, trust expenses similar to those involved in the *Vanderbilt Trust* case were disallowed but again no question of trustees' commissions was raised. In the *White Trust* case the Board supported the Commissioner on the ground that the expenses were not "ordinary and necessary" (40 B. T. A. 664, 671) but the Circuit Court of Appeals concluded that the trust was not engaged in business. In so deciding the Court relied heavily upon the decision rendered by the Circuit Court of Appeals in the cases at bar. So far as we have been able to discover, these are the only cases involving expenses of trusts.

It will be noted that the earliest of the cases discussed in the preceding paragraph did not arise until 1937. Thus, ever since the enactment of the income tax law, a period of over twenty years, there has been a uniform practice of allowing all the ordinary and necessary expenses in connection with the administration of trusts and only in special circumstances and on special grounds has the Treasury Department contested trust expenses. Thus, the consistent practice with respect to trustees' commissions has not been a fortuitous circumstance but is a part of a long standing administrative attitude toward trusts generally under which all the ordinary and necessary expenses incurred in trust administration have been uniformly allowed.

Cases involving expenses of decedents' estates in the process of administration are to be distinguished from the cases at bar. In the ordinary case executors' duties are limited to those of liquidation and distribution. See *Refling* vs. *Burnet*, 47 F. (2d) 859 (C. C. A. 8th); *Ames* vs. *Commissioner*, 49 F. (2d) 853 (C. C. A. 8th). Executors' activities are not unlike those of trustees of so-called "liquidating" trusts which have been held not to have been engaged in business so as to be taxable as corporations.

Mortgage Trust Certificate Pool vs. *Commissioner*, 42 B. T. A. 1258; *Broadway-Brompton Liquidation Trust* vs. *Commissioner*, 34 B. T. A. 1089. With such trustees, as with executors, the dominant purpose is liquidation; management and the production of income are only incidental. With trustees such as in the cases at bar, the dominant purposes are management, production of income and the devotion of the income to the purposes prescribed by the grantor. The executors' duties are to be discharged as soon as possible or practicable and are then to cease. The ordinary trustees' duties are to continue over a period frequently of indefinite duration when, as here, measured by lives.

There is no precise formula for determining what activities must be regarded as amounting to the conduct of a business. As this Court pointed out in *Higgins* vs. *Commissioner, supra*, the determination of the question for different tax purposes and with respect to different types of taxpayers may present "dissimilar" issues for decision. Under the law the trusts here have become new taxpayers disassociated from the grantor and operating in a manner vastly different from that of an individual taxpayer. Particularly is this true of testamentary trusts such as are involved in the cases at bar. It cannot be said, therefore, that the Treasury Department has been obviously wrong or has clearly misinterpreted the law in concluding that wise administration requires different treatment with respect to trusts from that accorded individual taxpayers. In the case of commissions paid trustees for the management of property of irrevocable and testamentary trusts, there is no disturbing confusion between personal and business expenses and consequently there is no need to protect the revenue against improper claims by imposing the same rules on such trusts as may be deemed applicable to individual taxpayers. It would not be unreasonable, we submit, for the purpose at hand that such trusts should be governed by the same considerations that are applicable to corporations under the capital stock tax regulations (Reg. 64, Art. 43) or that are applied for income tax purposes to trusts

operating in a form analogous to that of corporations. *Brooklyn Trust Company* vs. *Commissioner*, 80 F. (2d) 865 (C. C. A. 2nd) cert. den. 298 U. S. 659. In such cases when broad powers of management are granted and exercised as in the cases at bar, the corporations and quasi corporations are found to be engaged in business. Finally, as pointed out in the main brief of the petitioner in these cases (pp. 21-22), the Treasury's practice of allowing the deduction of trustees' commissions has avoided the confusion that would be involved in the application of a different rule under which, with respect to trusts whose income is fully distributable to beneficiaries, the respective income taxes of the trusts and the beneficiaries could be accurately determined only by the use of an algebraic formula. The Treasury's consistent practice is, therefore, not unsound as a matter of law and there are considerations of administrative importance to support it. Consequently, there is no compelling reason for this Court to overturn it.

CONCLUSION

There has been a settled administrative practice under which trustees' commissions such as are ordinary and necessary have uniformly been allowed as deductions. The practice is not contrary to law and is administratively sound. This Court should uphold the practice.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 408 and 409.—OCTOBER TERM, 1940.

City Bank Farmers Trust Company, as Trustee of a Trust Under the Last Will and Testament of Angier B. Duke, Deceased, for the Benefit of Anthony Newton Duke, Petitioner, 408 *vs.* Guy T. Helvering, Commissioner of Internal Revenue. City Bank Farmers Trust Company, as Trustee of a Trust Under the Last Will and Testament of Angier B. Duke, Deceased, for the Benefit of Angier B. Duke, Jr., Petitioner, 409 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 28, 1941.]

Mr. Justice BLACK delivered the opinion of the Court.

The ultimate question here involved is whether two testamentary trusts of which petitioner is trustee were in 1931 "carrying on business" within the meaning of section 23(a) of the Revenue Act of 1928.

Pursuant to the will of Angier B. Duke, two trusts, consisting of stocks and bonds worth approximately $7,600,000, were established in 1923 for the benefit of Duke's two minor sons. Petitioner, as trustee, was charged with the duty of applying a sufficient amount of the income of each trust to the support and education of the beneficiary; the surplus income was to be accumulated until the beneficiary's majority; and at that time all accumulated income was to be paid to the beneficiary, while the

principal was to be continued in trust for the benefit of the son and his descendants. By 1931, the principal and accumulated income of the two trusts aggregated about $10,000,000. In that year the Surrogate Court of New York County allowed trustees' commissions of about $77,000, ordering that payment be made out of principal. In reporting trust income for 1931, the trustee did not claim any deduction for these commissions. Later, in proceedings before the Board of Tax Appeals, the deduction was claimed but denied. The ground of denial was that during the taxable year the trusts had not been "carrying on any trade or business", the carrying on of such an activity being a condition precedent to the allowance of the claimed deduction under the controlling Revenue Act.[1] The Circuit Court of Appeals affirmed.[2] Differing interpretations as to the meaning and scope of "carrying on any trade or business" prompted us to grant certiorari in this case, in the case of *Pyne* v. *United States,* 35 F. Supp. 81, and in the case of *Higgins* v. *Commissioner,* 111 F. (2d) 795, 311 U. S. —.

In the *Higgins* case, decided on February 3, we affirmed the judgment of the same Circuit Court of Appeals that rendered the decision below. Higgins, an individual taxpayer whose activities did not vary materially from the activities of the taxpaying trusts in the case at bar,[3] was denied the deduction which peti-

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1 Revenue Act of 1928, §§ 23(a), 161, 162. Cf. George Vanderbilt Trust, 36 B. T. A. 967. Though petitioner urges that the Commissioner, because of concessions made before the Board of Tax Appeals, should be barred from asserting that the trusts were not carrying on business, the judgment of the Board rested on its finding that the trusts were not so engaged, and the issue is properly before us.

2 112 F. (2d) 457.

3 The Board found in this case that the trustee's activities were limited to reviewing the stocks and bonds in trust several times a year; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on security; keeping account books for the trusts and rendering statements to the interested parties; preparing and filing income tax returns; and distributing income to the beneficiaries. Summarizing, the Board of Tax Appeals said, "The above facts demonstrate conclusively to us that this is a case of passive investment and not of carrying on a business, for not only is the trustee limited in its investments, but it is cautioned in effect to be a safe investor rather than a participant in trade or business, and, plainly carrying out the testator's injunctions, it conducts no business, because it has, as above seen, no expenses of conducting business other than the collection of coupons and mailing bonds, amounting to a few dollars, and an even more negligible amount for transfer stamps or notary fees. . . . Extensive authority need not be compiled to demonstrate that a mere passive investor, collecting interest and clipping coupons, and making a very few reinvestments, is not engaged in trade or business."

tioner here seeks. And sections 161-162 of the Revenue Act of 1928 provide: "The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust. . . . The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual. . . ." Since the trust is subject to the same rules as the individual, and since the findings of the Board of Tax Appeals in the *Higgins* case and in the case at bar are substantially the same,[4] the *Higgins* case is controlling here, unless, as petitioner contends, distinguishable by reason of administrative practice in relation to trusts.

But we regard the *Higgins* decision as controlling despite petitioner's insistence that administrative practice has long permitted deduction of trustees' commissions. In view of the express Congressional command that the same method and basis of computation must be applied to trust income as to individual income, it is doubtful whether any administrative practice, no matter how clear or long existing, would warrant our applying one concept of carrying on business in the case of an individual and another concept in the case of a trust. This is particularly true here, where the statutory interpretation petitioner urges has never received support in any regulations promulgated by the Secretary of the Treasury.[5] And not only is the result reached by the court below consistent with our decision in *Higgins* v. *Commissioner*, but, as we said in the *Higgins* case, the conclusion of the Board of Tax Appeals "is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section."[6] The judgment below is accordingly

Affirmed.

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[4] It is clear that the Board was justified in reaching the conclusion that the instant trusts were not "business trusts" but existed merely to hold and conserve property and distribute the income received. Compare Morrisey *v.* Commissioner, 296 U. S. 344, 356-357; Van Baumbach *v.* Sargent Land Co., 242 U. S. 503, 515; Zonne *v.* Minneapolis Syndicate, 220 U. S. 187.

[5] Biddle *v.* Commissioner, 302 U. S. 573, 582; Helvering *v.* New York Trust Co., 292 U. S. 455, 467-468.

[6] The case referred to was Van Wart *v.* Commissioner, 295 U. S. 112, 115.